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NOTES.

EXTRATERRITORIAL RECOGNITION OF STATUTORY PREFERENCE.—Whatever the conflict of theory as to the law governing the various legal consequences attaching to personal property,[1] there is unanimity that with respect to the control over assets in insolvency proceedings, the jurisdiction of the situs is supreme.[2] This is perhaps due to the sovereign nature of the authority exercised by the state over property within its borders,[3] which, in proceedings of this nature, is emphasized by virtue of the fact that the assets are in effect severed from the insol-

[1]Wharton, Confl. of L. (3rd ed.) §§ 297, 305, 311; Minor, Confl. of L. § 14.

[2]Wharton, Confl. of L. (3rd ed.) § 801; Story, Confl. of L. (8th ed.) §§ 414, 423b; Holshouser *v.* Copper Co. (1905) 138 N. C. 248; Crapo *v.* Kelly (1872) 16 Wall. 610; Fletcher *v.* Harney Peak Tin-Min. Co. (1897) 84 Fed. 555.

[3]Minor, Confl. of L. § 14; Great Western etc. Co. *v.* Harris (1905) 198 U. S. 561.

vent and are held as a general fund for the satisfaction of claims.[4] Through the appointment of a receiver, the courts of a state reserve to themselves and exercise, exclusive jurisdiction over these funds, whether such receivership be primary or ancillary.[5] It is important, therefore, to determine the effect of proceedings of this nature upon interests without the jurisdiction, and to what extent and in what manner they may be asserted with respect to such funds.

These interests are primarily safeguarded by the Federal Constitution, Article IV, Sec. 2, entitling the citizens of each State to all privileges and immunities of citizens in the several States. Under this provision a foreign creditor may assert equally with local creditors such rights as are provided for under local law,[6] and local statutes cannot constitutionally discriminate against him.[7] Furthermore, where circumstances warrant the overriding application of the Federal Bankruptcy Act, foreign rights are of course removed from local control.[8] But a more difficult problem is presented when the rights asserted by the foreign creditor are created under, and are peculiar to, the laws of a jurisdiction other than that of the forum. Of this nature is a claim founded upon the statute of a foreign jurisdiction. The creation of such a claim and its attempted satisfaction is in manifest derogation of the control of the courts of the forum over funds within their jurisdiction, and having no inherent extraterritorial quality, would not be entitled to enforcement as a matter of right.[9] Under these circumstances, the satisfaction of foreign claims would depend upon comity, the discretionary scope of action under which, is restricted by considerations of local policy.[10] Thus where the question of recognizing a foreign receiver for the purposes of suit has arisen, a right similarly created by authority having no extraterritorial force,[11] a definite local policy has prevented the exercise of comity where prejudice would inure to the interests of local creditors.[12] Although the claim under consideration is essentially similar with respect to the authority creating it, and its recognition would prejudice the rights of local creditors to the extent of diminishing their distributive shares, it is submitted that so stringent a policy should not apply. The recognition of a foreign receiver is, in the administration of the insolvent estate,[13] a matter of expediency merely, in refusing which, the de-

[4]Minor, Confl. of L. § 14; Taylor *v.* Columbian Ins. Co. (Mass. 1867) 14 Allen 353.

[5]Reynolds *v.* Stockton (1891) 140 U. S. 254.

[6]Belfast Savings Bank *v.* Stowe (1899) 92 Fed. 100; Blake *v.* McClung (1898) 172 U. S. 239; Hibernia Nat. Bank *v.* Lacombe (1881) 84 N. Y. 367.

[7]Blake *v.* McClung *supra.*

[8]New Jersey *v.* Anderson (1906) 203 U. S. 483.

[9]Holshouser *v.* Copper Co. *supra;* Security Trust Co. *v.* Dodd, Mead & Co. (1899) 173 U. S. 624; Paine *v.* Lester (1876) 44 Conn. 196; see Ballou *v.* Flour Milling Co. (1904) 67 N. J .Eq. 188.

[10]Minor, Confl. of L. §§ 6, 7; Security Trust Co. *v.* Dodd, Mead & Co. *supra;* Paine *v.* Lester *supra.*

[11]Minor, Confl. of L. §§ 117, 118; 6 COLUMBIA LAW REVIEW 521.

[12]Minor, Confl. of L. §§ 117, 118; 6 COLUMBIA LAW REVIEW 521.

[13]Hurd *v.* City of Elizabeth (1879) 41 N. J. L. 1.

struction of the rights of foreign claimants is avoided by the possibility of ancillary receivership.[14] Where, therefore, a recovery by the receiver might have the effect of depriving local creditors of all means of satisfying their claims, a rigid limitation upon the exercise of comity is eminently proper. Individual claims, however, arising under the circumstances adverted to, have no other means of satisfaction than those accorded by comity, and so rigid a definition of local policy would involve the annihilation of just claims. Without sanctioning the creation of claims having extraterritorial effect *proprio vigore*, it would therefore seem proper that they should be capable of recognition upon equitable considerations even where diminishing the funds subject to the demands of local creditors. In a recent case, *Franklin Trust Co.* v. *State of New Jersey* (C. C. A. 1st Cir. 1910) 181 Fed. 769, the decree of the Circuit Court, allowing a claim based on a New Jersey statute entitling a franchise tax to preferential payment, was reversed on the ground that the tax was an arbitrary imposition, impairing substantial rights of local creditors. The corporation had been organized in New Jersey with its business and property entirely situated in Massachusetts. The tax was imposed after the commencement of insolvency proceedings, but the franchise was in fact exercised by the receiver thereafter. In view of the last mentioned consideration, and of the fact that the tax was a valid condition imposed upon the existence of the corporation,[15] Putnam, J. contended that the discretion of the lower courts had been properly exercised.

Because of the fact that the receiver was authorized by the creditors to continue the business and consequently to exercise the franchise, the recognition of a claim even for preferential payment as a recompense therefor, would seem to rest upon strong equities.[16] The New Jersey courts, however, expressly disclaim the interdependence of the exercise of the franchise and the power to impose the tax in question, insisting that it is properly leviable during the entire period of the corporation's existence.[17] Although the dissenting opinion refuses to attach decisive importance to this attitude, it would seem nevertheless to deprive an otherwise arbitrary imposition of all claim to equitable recognition, particularly in a jurisdiction where a tax is properly leviable after insolvency only by virtue of the continued exercise of the charter.[18] Where circumstances show no special equities, local policy would demand a refusal of comity as a matter of discretion, where injurious to local interests. The prevailing opinion, however, in adopting this position, is prepared to admit the force of special equities in the proper case, thus avoiding the consequence involving the manifest injustice of allowing the mere impairment of the interests of local creditors to be destructive of claims unenforceable because dependent on foreign law.

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[14]Fowler *v.* Osgood (1905) 141 Fed. 20; Hurd *v.* City of Elizabeth *supra.*

[15]*In re* U. S. Car Co. (1899) 60 N. J. Eq. 514; New Jersey *v.* Anderson *supra.*

[16]See Commonwealth *v.* Lancaster etc. Bank (1878) 123 Mass. 493; In the matter of George Mather's Sons Co. (1894) 52 N. J. Eq. 607.

[17]*In re* U. S. Car Co. *supra.*

[18]Commonwealth *v.* Lancaster etc. Bank *supra.*